No. 3072

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF OF PLAINTIFF IN ERROR

F. DEJOURNEL,
T. C. WEST,
ROY V. NYE,
Attorneys for Plaintiff in Error.

LOWMAN & HANFORD CO., SEATTLE

No. 3072

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is an action at law on a bond in which one Grazi, as principal, and the plaintiff in error, Illinois Surety Company (defendant below), as surety,

were the obligors and the United States of America (plaintiff below) was the obligee. Grazi came to this country from France not later than October 1, 1911 (Tr. pp. 71-72), and a number of weeks later, to-wit, on November 4, 1911, the goods described in the bond, to-wit, certain theatrical effects, arrived at the port of New York on the steamer *Caroline* from Havre, France, and were immediately transported by rail thence to San Francisco, under a transportation bond (Tr. p. 30). The goods arrived at San Francisco on November 11, 1911, and on the same day the bond in suit was given. Grazi was the manager of an opera company, and the goods were theatrical scenery, properties and apparel which he designed to have his singers use, and which they did use, in the presentation of operas at San Francisco and other Californian cities.

The complaint (paragraph VI, Tr. p. 2) represents the bond to have been taken under the provisions of paragraph 656 of the tariff act of August 5, 1909. That paragraph provided that theatrical effects might be entered free of duty provided a bond was given "for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation," but the Secretary of the Treasury could extend the time for a further term of six months. The bond in question is set out in full in the complaint (Tr. pp. 3-5), and was conditioned, not for the payment of duties *or* for the exportation of the goods, but simply for the

exportation of the goods; there is therein no mention of and no condition for the payment of duties. And it was conditioned, not for the exportation of the goods generally (so that they might be exported from any port of export in the United States), but for the exportation thereof from the port of San Francisco.

The complaint (paragraphs V, VIII and X, Tr. pp. 2, 5) endeavors to remedy the failure of the bond to include both of the alternative conditions set forth by the statute—the failure to include in the bond the alternative condition that the duties may be paid by the importer; it endeavors to supply this missing condition by alleging (paragraph V) the amount of the duties on the goods, and (paragraph VIII) that a part of the goods, on which the duty was a certain stated sum, were redelivered for exportation, and (paragraph X) that the difference between said two sums, being "the duty on that between said two sums, being "the duty on that portion of said goods not exported or delivered for exportation above set forth, has not been paid, nor any part thereof." The prayer is for the amount of the *duties* so alleged to remain unpaid ($6,108.66), though it does also pray "for the penalty of said bond" ($6,000). But neither on the trial nor in the judgment or opinion of the Court below was the case treated as being for duties, but it was treated throughout as simply an action on the bond. Of course this is the only theory on which the case could possibly be brought against the surety com-

pany, for it was not liable for the duties as such, though Grazi may have been liable therefor.

The surety company demurred on the complaint, generally and also for uncertainty, ambiguity and unintelligibility (Tr. pp. 7-8). The demurrer was overruled, with leave to answer (Tr. p. 9). The defendant answered. The case was tried before the Court without a jury, a jury having been waived by stipulation. On the trial it was shown by the defendant and admitted by the plaintiff (Tr. pp. 71-72) that Grazi came to this country from France many weeks before the goods arrived from France and by an entirely different voyage, whereas the statute, as construed by the Treasury Department and the courts, provides that the goods must come on the very same vessel and at the very same time as the importer, in order to be subject to entry duty-free under a bond for their exportation later on or (as an alternative thereto) the payment of duties thereon. Judgment was given (Tr. p. 22) in favor of plaintiff below for the penal sum named in the bond, $6,000, that being less than the amount of duty alleged in said paragraph X of the complaint (Tr. p. 5) to remain unpaid; to the said penal sum interest and costs were added. The surety company thereupon sued out this writ of error.

Thus, the vital questions are:

(1) The question raised by the general demurrer whether the complaint states a cause of action at all,—i. e., whether the bond set out therein is not fatally defective and void from every point of

view—as a statutory bond and as a common law bond: void as a statutory bond (a) because of the entire omission therefrom of one of the alternative conditions mentioned in the statute, namely, that the duties might be paid by the importer, and (b) because of the inclusion, in the condition for exportation, of the requirement that the goods be exported through the port of San Francisco only; void as a common law bond on the grounds that there was no basis on which a common law bond could rest and that there was no consideration therefor.

(2) The question arising on the evidence whether, since Grazi came into the country many weeks before the goods came and not at all at the same time or by the same vessel as they came, and since he was not in actual possession of the goods when they came, the conditions under which any bond whatever could be exacted and taken by the government were not entirely lacking in an absolutely essential particular, and whether the bond is not therefore entirely void.

For the sake of convenience this latter question will be hereinafter considered first, and then the former question will be dealt with.

The surety company has assigned and now relies on the following errors:

SPECIFICATION OF ERRORS

1. The Court erred in overruling the amended demurrer of the defendant to the complaint (Assignment of Error No. I, Tr. pp. 92).

2. The Court erred in adjudging that the plaintiff shall recover the sum of six thousand seven hundred and ninety-eight dollars and costs taxed at $29.10 from the defendant (Assignment of Error No. XX, Tr. p. 106).

3. The Court erred in not rendering and entering judgment against the plaintiff and in favor of the defendant to the effect that plaintiff take nothing by this action (Assignment of Error No. XXIV, Tr. p. 106).

ARGUMENT*

There are certain propositions which we think will appear clearly as we proceed. They are: (1) Theatrical effects are "implements, instruments, and tools of trade, occupation or employment;" (2) where theatrical effects are brought into this country from a country across the sea, as these were brought from France, they must come on the very same vessel and at the very same time as the importer, in order to be entitled to free entry under a bond for exportation or payment of duties later,—unless they come at the same time and on the same vessel as the importer they do not fall within paragraph 656 of the tariff act of 1909 and therefore no valid bond for duties or exportation can be taken under the terms thereof; (3) the bond in suit is not a statutory bond under paragraph 656 of the act of 1909 because the plain terms of that paragraph cannot be and are not met by a bond conditioned, as this one is, for only one of two alterna-

* Note: Italics in this brief are ours.

tives, either of which the importer has a right to avail himself of—to-wit, either to export *or* pay the duties on the goods; (4) even the one condition actually expressed in the bond, viewed by itself and apart from the considerations just mentioned of failure to express alternative conditions, is not in accordance with the statute, and the bond is invalid as a statutory bond, because the law and customs regulations permit the importer to export through *any* port of the United States, while the bond in suit requires exportation to be through the port of San Francisco; (5) the bond is not good as a common law obligation.

Theatrical Effects are Tools of Trade, and Must Come on the Very Same Vessel and at the Very Same Time as the Importer.

The true nature of the provision regarding entering theatrical effects duty-free on a bond conditioned for exportation within six months (or a year) or the payment of duties, will be better seen if we take a view of its genesis, history and associations.

In the free list of the act of March 2, 1861, 12 Stat. at Large 178, 196, Chap. 68, §23, occurs the following paragraph:

> "Wearing apparel in actual use, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation, or employment of persons arriving in the United States: *Provided*, That this exemption shall not be construed to include

> machinery, or other articles imported for use in any manufacturing establishment, or for sale."

This paragraph was carried into the Revised Statutes practically unaltered, §2505, p. 489.

The law of March 3, 1883, 22 Stat. at Large 488, 521, Chap. 121, simply continued the provision of the Revised Statutes on this subject.

The law of October 1, 1890, 26 Stat. at Large 567, 609, Chap. 1244, paragraph 686, for the first time devotes a separate paragraph (apart from "wearing apparel") to instruments, etc., of trade, occupation, or employment (and in subsequent laws they have continued to enjoy a separate paragraph). Moreover, and significantly, the language is changed so as to make it clear that the goods *must come with* the person bringing them. Theretofore, as we have seen, the law read "tools of trade * * * of persons *arriving* in the United States." But the law of 1890 reads as follows:

> "686. Professional books, implements, instruments, and tools of trade, occupation, or employment, *in the actual possession at the time of persons arriving* in the United States; but this exemption shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons, or for sale."

For the first time theatrical effects are expressly mentioned in the law of August 27, 1894, 28 Stat. at Large 509, 543, Chap. 349, paragraph 596, and

that law was the first to require either of the conditions ever since then and now required, namely, that the goods be exported within a given time or the duties thereon be paid. Said paragraph 596 is in the following words:

> "596. Professional books, implements, instruments, and tools of trade, occupation, or employment, in the actual possession at the time of persons arriving in the United States; but this exemption shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons, or for sale, nor shall it be construed to include theatrical scenery, properties, and apparel, but such articles brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them in such exhibitions and not for any other person and not for sale and which have been used by them abroad shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe; but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation: *Provided*, That the Secretary of the Treasury may in his discretion extend such period for a further term of six months in case application shall be made therefor."

The law of July 24, 1897, 30 Stat. at Large 151, 200, Chap. 11, paragraph 645, is in the same words exactly except that the words "arriving in" are changed to "emigrating to."

In the law under which the bond in this case was given, 36 Stat. at Large 11, 78, Chap. 6, paragraph 656, there was a still further "tightening up" of the phraseology restricting the importation to the very time of arrival of the person bringing the goods, by changing the clause reading "in the actual possession at the time of persons arriving in the United States" so as to make it read "in the actual possession at the time of *arrival,* of persons emigrating to the United States." Except in this particular the paragraph remains exactly the same as the corresponding paragraphs in the acts of 1894 and 1897.

Since, before there was any express mention of them, theatrical effects had already been held both by the Department and the courts to be implements or instruments of employment within the meaning of the tariff paragraph applying to tools of trade, there appears to have been on reason for expressly mentioning them in the act of 1894 (the first law to designate them expressly) and subsequent laws, except for the purpose of setting forth the restrictions then for the first time imposed on theatrical effects, over and above the restrictions imposed on other tools of trade, namely, that though *admitted* duty-free they must be exported within a year, at the longest, or else duty must be paid on them.

In other words, by the laws of 1894 and subsequently, all the restrictions as to other tools of trade (that they must not be brought for any other person or for sale, or be brought on any other ves-

sel or at any other time than the importer) were retained as to theatrical effects, and more restrictions were added—they must be exported within a year or duty must then be paid, and bond to secure the performance of one of these alternatives must be given.

It is clear from the history of the provision that it is intended that theatrical effects shall be brought on the very same vessel on which the person comes who brings them. This appears from the following: *First.* They were not mentioned expressly in any act prior to 1894, but were assimilated to and included among wearing apparel, implements, instruments and tools of trade at all times from 1861 to 1890 (for only from and after 1890 were they, with other tools of trade, given a paragraph separate from wearing apparel). Now, wearing apparel of course comes with the immigrant, in his hand or in his trunk; it arrives on the same steamer with him. *Secondly.* And in the very law (that of 1890) which thus gave tools of trade a separate paragraph, language was introduced with should make amends for taking tools of trade out of the paragraph concerning wearing apparel; the very juxtaposition to wearing apparel, so long as tools of trade were in the same paragraph, would naturally lead to the interpretation that they must come with the importer, and on the same steamer; when that juxtaposition was destroyed, the naked word "arriving" was replaced by the words "in the actual possession at the time of persons arriving." Could language make

it more clear that "tools of trade" *must* come on the very same vessel as the immigrant in order to be entitled to free importation, except by using the very words "on the same vessel"? *Thirdly.* As if intending to introduce the equivalent of the very words "on the same vessel" the wording of the provision was changed in 1909 by stating that the tools of trade must not only be in the actual possession at the time of persons arriving but must be "in the actual possession *at the time of arrival* of persons emigrating to the United States." Bearing in mind that immigrants may come not only by vessel from across the ocean, but by train from Mexico or Canada, or by horses and wagon, or automobile, or even afoot, from either of the latter countries, it is clear why the general language "in the actual possession at the time of arrival of persons emigrating to the United States" was used instead of the more special language, "on the same vessel," or "on the same vessel or train," or even "by the same means of conveyance." The general language used covers all of these special cases and more, for it covers coming in afoot carrying one's tools of trade or pushing them in a hand-cart. But the words of the statute are just as insistent as any of the alternative but more special expressions just suggested that the goods must come *at the very same time as* and *with* the person.

We take it that no doubt can reasonably exist that theatrical scenery, properties, and apparel are "implements, instruments, and tools of trade, occupa-

tion or employment," and that the same restrictions are to be applied to them—as regards their coming in at the very same time and on the same vessel—as are applied to other tools of trade. Several things establish this conclusively: (1) they have been uniformly *held* to be tools of trade—even before they were expressly mentioned in the statutes they were so held to be by the Treasury Department, and since they were expressly mentioned they have been so treated by both the Treasury Department and the courts; (2) in *reason* they are tools of trade; (3) the *form of the statute* shows that congress recognized and treated them as tools of trade.

The decisions of the Department and the courts have recognized theatrical effects as tools of trade. On February 4, 1893, under the act of 1890 and before the first tariff act was passed which contained an express mention of theatrical effects in connection with "tools of trade," etc., it was held, T. D. 13796, in regard to certain scenery imported by Madame Sara Bernhardt from Australia and landed at San Francisco to be used by her in the play "Theodora," as follows:

> "We find that the said goods are the instruments or implements of the occupation of Madame Bernhardt in her actual possession at the time of her arrival in the United States * * *."

The report of *Henderson v. United States,* 66 Fed. 53, shows that both the Treasury Department and the Circuit Court of Appeals, Second Circuit, con-

sidered theatrical effects as tools of trade under the law of 1890.

Next, as to the reason of the matter. The purpose of the provision is clearly to admit duty-free the tools, implements and instruments—in one word, the instrumentalities—by which the immigrant has been accustomed to obtain his livelihood. It embodies an exception to dutiable objects, an exception based on reasons of public policy; for it is matter of public policy to permit immigrants to land in this country fully equipped, so far as may be, with the means and facilities for earning a livelihood immediately. Hence they are permitted to bring with them duty-free such instrumentalities as they have been accustomed to use in acquiring a livelihood abroad. And are not the togas, swords and shields of Brutus, Cassius and Caesar as much the instruments of employment of the actors who play those characters as the saw, hammer and square of a carpenter are his instruments of employment?

Lastly, as to the view of congress as expressd in the statute itself. As a matter of construction and interpretation, we find that the paragraph forbids the importation of theatrical scenery, properties and apparel "for any other person," just the same as it forbids the importation of other implements of trade for any other person. And it forbids importation of theatrical effects "for sale," just as it forbids importation of other tools of trade for sale. As to these restrictions there is a complete parallel, or, rather, identity.

But there is one restriction on the importation of theatrical scenery, properties and apparel which is not made against the other professional implements and instruments of employment, namely, the provision that they "have been used by them abroad." Undoubtedly the *spirit* of the statute is that the implements of employment first mentioned therein (i. e., those other than theatrical effects) shall have been used abroad by the persons bringing them to this country. In Treasury Decision 10916, under the law of 1890, it was held that law books bought by an American lawyer while abroad, but not used by him while abroad, and brought by him on his return, were not free. And as far back as under the law of 1861, as carried into the Revised Statutes, namely, in 1875, it was held, Treasury Decision 2369, that immigrants cannot bring with them free of duty *new* implements of their profession or trade, though intended to be used by them in the exercise of their profession or trade in the United States. And in order to leave no room for doubt that this is the correct interpretation congress inserted in the next (i. e., the present) general tariff law, act of October 3, 1913, 38 Stat. at Large, Part I, p. 114, Chap. 16, paragraph 582, the words "owned and used by them abroad" as a qualification or restriction on importation of the professional instruments first mentioned therein, i. e., those other than theatrical effects.

But in the law of 1909 there is no express restriction to the effect that tools of trade other than

theatrical effects must have been used abroad by the immigrant. Hence, in this restriction in the law of 1909 as to theatrical effects, there is an apparent intention to insure the bona fides of the importation by forbidding the importation of any but costumes, scenery, properties, etc., which have actually been used abroad "by them."

What is the significance of the provision limiting to six months or a year the presence, duty-free, in this country of theatrical effects, whereas there is no such limitation on other instruments of employment? We do not regard this as a restriction on importation of such effects of the same nature as the restriction against importing for another person or for sale. It was not inserted from the same policy. It is imposed because of the *character* of the theatrical business—because of the differences between it and other "trades, occupations and employments." A carpenter will need his saw and hammer as long as he is able to work. But an actor does not play the part of Mark Antony continuously all his life long; he plays that part one season and another the next. In the regular course of the theatrical business it runs by "seasons" or years. The statute is designed to meet the necessities and realities of the particular trade and employments. So far as theatrical scenery, properties and apparel are concerned these necessities and realities are met in the main and generally, by permitting importation duty-free, for a period of six months, or, in exceptional cases, one year. That, we

take it, is the reason why a period is fixed during which, only, theatrical effects may remain duty-free, in the country. The reason of this limitation does not extend to other implements of employment and hence congress did not extend the limitation to the latter. Therefore, we do not contend that this restriction, as to time, on theatrical effects, manifests, in itself, a disposition on the part of congress to impose greater limitations on the importation of theatrical effects than on the importation of other implements of employment. In each case the importation, duty-free, is permitted so far as the necessities of the case require, as those necessities exist usually and in the regular course of things.

But while we do not base on the limitation as to time any argument that congress designed to impose a greater limitation on the importation of theatrical effects than on the importation of other implements of employment (in each instance the limitation or lack thereof being controlled by the natural duration of the use of the "instrument" imported), we do maintain that there is every reason to view the limitations on importation of theatrical effects as *not less narrow* than the restrictions on the importation of said other implements of employment.

We have already seen that no person who brings in either theatrical effects or other instruments of employment *for sale* is entitled to have them entered duty-free. The same is true of all instruments of employment brought in *for any other per-*

son. And as to instruments of employment other than theatrical scenery, properties and apparel, there is the further condition that they must be "in the actual possession at the time of arrival, of persons emigrating to the United States." Is there such a condition as to theatrical scenery, properties and apparel? As we understand the statute, there is. It prescribes that such articles must be "brought by proprietors or managers of theatrical exhibitions *arriving from abroad.*" The words "arriving from abroad" certainly modify "proprietors or managers," not "exhibitions." So there is a complete parallel here also. In each instance the instruments of employment must *come with t*he person bringing them—in the one instance they must be "in the actual possession at the time of arrival," in the other they must be "brought by" persons "arriving from abroad." We take these two statements to have an identical signficance. For as to the first instance (instruments of employment other than theatrical effects) the goods are in the custody of the steamship company, as much as they are in the case of theatrical effects. That custody is construed to be the "actual possession" of the person bringing them and who comes on the same vessel,—*and he must come on the same vessel.*

> *Rosenfeld v. United States,* 66 Fed. 303;
> *Sandow v. United States,* 84 Fed. 146.

It is true that before the Rosenfeld case was decided (which was in 1895) the Department, in two

instances and (so far as we have been able to find) in no more, had shown a disposition to apply a more relaxed rule regarding the necessity of the goods coming in the very same vessel and at the same time as the importer. Those were in Treasury Decision 13785, given in 1893 under the law of 1890, and in Treasury Decision 14049, also given in 1893 and under the law of 1890. In the former it was ruled that though the tools did not arrive on the same vessel with their owner, yet since they were in the importer's possession "at the moment of his departure for this country, and were in transit during his voyage" and "he had in his possession at the time of his arrival a bill of lading for said tools of trade—this was legally tantamount to legal possession." In the latter decision it was ruled that theatrical effects imported by Wilson Barrett, an actor and manager, were duty-free, although Mr. Barrett arrived at New York on a fast liner and the goods were shipped by slower vessel direct from Liverpool to Philadelphia where his performances were to begin. This was certainly a great straining of the law; we do not find another instance of such a strained application of it.

But on the other hand stands Treasury Decision 10916, given in 1891, under the law of 1890, in which it was held that law books not brought actually with the importer on his return to this country were not duty free. And the act of 1890 was also involved in the ruling in Treasury Decision 12199 made November 16, 1891. Therein it is said:

> "Paragraph 686 restricts free admission to tools of trade 'in the actual possession at the time of persons arriving in the United States.' Mr. Kernisch arrived in the steamship *Eider,* while the workbench was imported in the steamship *Polynesia.* The protest is overruled"—and free entry was not allowed.

Then came the decision in the *Rosenfeld* case, 66 Fed. 303, made in 1905, followed by that in *Sandow v. United States,* 84 Fed. 146, and these cases have since been undeviatingly followed by the Department.

In the *Rosenfeld case,* 66 Fed. 303, the facts were that "in July, 1891, the appellant caused to be shipped at Berlin, where he was, for Bremen, with instructions to a broker at Bremen to forward them to this country by the first freight steamer, certain costumes, properties, and scenery belonging to the appellant and his brother, for use by them in theatrical representations to be given in this country. The articles arrived at the port of New York and were entered for duty about the middle of October, 1891. The appellant had meantime taken passage on a steamer which arrived at the port of New York about the middle of July, 1891." Rosenfeld claimed free entry under the "tools of trade" paragraph of the free list, but the board of appraisers levied duty on the goods. Rosenfeld appealed and the Circuit Court affirmed their decision. Rosenfeld then appealed to the Circuit Court of Appeals. The latter court said, 66 Fed. 304:

"The exact inquiry is whether articles which do not arrive in the United States at the same time or in the same vessel with the person importing them are to be deemed in his 'actual possession at the time of his arriving,' within the meaning of the statute. The previous statutes placing professional implements and instruments of trade upon the free list do not throw any light upon the inquiry, because until the statute in question the only limitation was that the articles should 'belong' to persons arriving in the United States, and should not be imported for sale or for use in any manufacturing establishment. The words 'in the actual possession at the time of his arriving' constitute a new and further limitation. Pursuant to this language, it is not enough that the articles should belong to the person arriving, or be in his possession constructively, but they must be in his actual possession at the time. * * * Literally, and giving the words their ordinary meaning, the 'actual possession' of the statute is an open, visible, present occupancy and possession of the articles imported. In order to leave no doubt that this is the meaning, the actual possession and the arrival of the owner must be coincident. We suppose that articles which are brought with the owner, in the same vessel, are to be deemed in his actual possession at the time of arriving, although they are in the immediate custody of the carrier. The carrier is his custodian, and the goods, under such circumstances, would be in the actual possession of the owner, equally as if they were in the custody of his personal servant. If, however,

the articles arrive in a different vessel and at a different time from the owner, it would seem plain that they are within the excepted category.

"These conclusions lead to an affirmance of the judgment."

And the *Sandow* case, 84 Fed. 146, decided nearly three years later, but arising also under the law of 1890, applied the same construction to the statute. The court said:

"These are horses conceded, in argument, to have been so trained and used in exhibitions as to be implements of occupation of the plaintiff. The ship in which he came would not bring them, and they arrived otherwise a few days after he did. They were not in his possession as of a person at the time 'arriving within the United States,' within the requirement of paragraph 686 of the act of 1890, for he was not then arriving, but had arrived some time before."

These two cases were followed by the Department in:

Treasury Decision 15993;
Treasury Decision 16481;
Treasury Decision 22558;
Treasury Decision 26337.

In Treasury Decision 15993 it is said:

"It appears from the papers in the case that in the early summer of 1894 Mr. Sherman Brown, a theatrical manager and proprietor, gave an order in London for 70 theatrical costumes and properties for certain actresses he

proposed to bring over to this country. Mr. Brown reached New York in the *City of Paris* July 15; his actresses arrived by the *Lucania* July 21, but owing to the delay of the London costumer the theatrical properties shipped by the *Campania* did not reach America until August 18.

"The goods were assessed for duty, but are claimed to be entitled to free admission under paragraph 686, act of October, 1890, as tools of trade or professional implements.

"Paragraph 686 exempts from duty tools of trade, etc., 'in the actual possession at the time of persons arriving in the United States.'

* * *

"But the United States Circuit Court of Appeals for the Second Circuit (*in re* Rosenfeld) has recently rendered a decision which sharply defines the meaning of the words 'actual possession,' as used in paragraph 686.

"The Court says [and here quotes from the Rosenfeld case the statement which we have already quoted from that case].

"The ruling of the Court is plain, and the Board, of course, will follow it.

"The protest is overruled accordingly."

Where an architect claimed that certain mechanical drawings executed by himself and used in his business as patterns, were exempt from duty under paragraph 645 of the act of July 24, 1897, as "tools of trade," the General Appraiser, on October 18, 1900, ruled, Treasury Decision 22558—G. A. 4783, that the drawings, so far as their *nature* was concerned, fell within the exempted class named

in that paragraph; but the written statement of the claimant was, in part, as follows:

> "That the trunk mentioned herein was shipped from Kohn by me in time to connect with the steamer on which I arrived, but it was delayed on the way and did not reach Hamburg in time, and I was compelled to leave it to be forwarded by following steamer."

And the ruling was as follows:

> "A case within the requirements of 'actual possession' laid down in *in re* Rosenfeld (66 Fed. Rep. 303), hereinafter quoted, is not made out. On the contrary this declaration shows the emigrant not in actual possession at the time of his departure."
>
> * * *
>
> "The actual question, then, is whether articles which *do not* arrive in the United States at the same time or in the same vessel with the person importing them are to be deemed in his 'actual possession at the time' (of his arrival), within the meaning of the statute. The words 'in actual possession at the time' (of his arrival) constitute a limitation."
>
> * * *
>
> "As these drawings arrived in a different vessel at a different time from the owner, it is clear that they were not in his *actual possession* —the actual possession and the arrival of the vessel must be coincident."

In Treasury Decision 26337—G. A. 6029, under date of May 2, 1905, it was ruled that certain things (which were admittedly tools of trade but which arrived at New York from abroad in June, 1904,

whereas their owner had arrived on a prior trip of the same steamer in March, 1904), did not come with the importer; and held further that the word "emigrating" in the law of 1897, used where "arriving" had been used in earlier acts, did not change the proper construction to be placed on the paragraph. The objects and the importer must come on the very same trip of the very same vessel.

Hence for the past twenty-three years there has been a uniform course of decision, both by the Department and by the courts, that in order that theatrical effects, or any other tools of trade, may be entered duty-free (whether absolutely or under bond for exportation), they and the importer must come into this country at the very same time; and this means that where they come by vessel from across the ocean they must come by the very same trip of the very same vessel.

On pages 71-72 of the Transcript appears the following:

> "GASTON GARONNE, a witness called and sworn on behalf of the defendant.
>
> Mr. deJOURNAL.—We would like to have Mr. Imhaus act as interpreter.
>
> The COURT.—What is the purpose of this testimony, to corroborate the last witness?
>
> Mr. WEST.—We want to show that he came from Paris on the ship with these goods; we want to show they were not brought here with Mr. Grazi.
>
> The COURT.—*Do you claim that they were?*
>
> Mr. JARED.—*No, we do not.*

The COURT.—*You admit Mr. Grazi did not accompany the goods at all?*

Mr. JARED.—*I have learned since he did not.*"

* * *

"Mr. WEST.—Probably this will be admitted too, that Mr. Grazi was here in San Francisco during the whole of the month of October, 1911, and did not come with these goods from France.

The COURT.—Counsel has already admitted he did not come."

The goods arrived in this country in the steamer *Caroline* from Havre, France, and were entered at the port of New York on November 4, 1911, the date of the arrival of the vessel at that port (Tr. p. 30).

Under the authority of the rulings which we have reviewed we see no rational escape from the conclusion that, since the proof in this case shows and it is admitted by the government that the goods did not come with Grazi but that he came and was in this country many weeks before they arrived, they were not within the case of duty-free goods, under said paragraph 656. Therefore, the government should have collected duty on them on their arrival, for neither that paragraph nor any other authorized the government to take a bond for the exportation of the goods within a limited period, or, in the alternative, the payment of duty on the goods; or authorized the government to take a bond conditioned, as this one is, for exportation only. Therefore the

bond was wholly unauthorized by law. As a statutory bond it is void.

The Statute Requires That the Goods Shall Be Exported Within a Stated Time or Duties Shall Be Paid on the Goods. A Bond Conditioned, as This One is, for Exportation Alone is Void as a Statutory Bond.

A statutory bond, in order to be valid as such, must contain all of the essentials prescribed by the statute itself. If the statute permits the obligor to discharge himself of liability by doing either of two alternative acts and the condition of the bond mentions only one of them it is void as a statutory bond. If this were not so the obligor might perform the alternative act which was omitted from the bond and the bond would still be enforceable against him, and he would thus be penalized without authority from the statute. A plea of performance would be unavailing as a defense to the bond unless the proof were of performance of the very condition mentioned in the bond; evidence of performance of the unmentioned alternative would be incompetent, irrelevant and immaterial. The only possible way to protect the obligor against what amounts to a double penalty is to hold the bond void.

In the case of a bond given at one port conditioned for the entry of goods at another port of the United States, where the statute made an exception—"dangers of the sea excepted"—and this exception was omitted from the conditions of the bond, the bond was held void. Chief Justice Mar-

shall, sitting as Circuit Justice said in that case, *United States v.* ....., 1 Brock. 195, Fed. Cas. No. 14,413:

> "* * * the legislature have commanded that the exception form a part of the condition of the bond. If such condition do not appear, it is not such a bond as the statute has directed, and has authorized the collector to take. The exception is, in itself, very material, and, therefore, the officer is not at liberty to dispense with it, although it should be true that by skilful pleading, the defect might be cured. The act does not permit him to impose this risk on the obligor. The bond to be good as a statutory bond, ought to contain what the law requires."

And when it was argued that the conditions which the statute prescribes need not be expressed in the bond, he said:

> "The first position to be examined is this: It is contended that the law does not require the words 'dangers of the seas excepted,' to be inserted in the bond. The statute itself must decide how far this position is correct. The words are, 'the master, &c, of such vessel shall first give bond, &c.' If no more was intended by this position, than to say that the very words in which the obligation should be expressed are not prescribed in the statute, the position would be true in itself, but the court would be at a loss to discern its application to this case. On a statute which prescribes, not the words, but the substance of a bond, the force of that argument is not perceived, which contends, that because the precise form is not given, the sub-

stance which is given may be disregarded. If it was intended to say that the statute does not require the exception in some form to appear in the bond, the correctness of the construction cannot be admitted."

Where too much, by way of conditions, is inserted in a bond, the excess may be eliminated; but where too little is inserted, the deficiency cannot be supplied by the court, and the bond is void. On this point Chief Justice Marshall said, in said case of *United States v.* .....:

"In that case [*United States v. Dixon,* Fed. Cas. No. 3,934] as in this, the condition of the bond was in part unauthorized by law, and a condition was omitted, which the law was supposed to require. In its reasoning, the court inclined to the opinion, that the surplusage did not vitiate the bond; but determined that it was vitiated by the omission of a material condition required by law. The reason for determining the two objections differently, is this. The court supposed itself competent to say, on a bond containing everything required by law, and something more, that the surplusage might be considered as an absolute nullity, and the bond construed as if such surplus and void matter was not contained in it. This is not a novel principle. There are many cases in which surplus matter is rejected. By rejecting it in this case, the bond conforms to law, and it is an effort to give validity to the instrument. It is possible, the effort may not be defensible. But where an essential circumstance required by law, is omitted in the bond, the court does

not believe itself competent to supply the omission, and to make the bond conform to the statute. No analogous case is known, in which a court of law exercises such a power. The court may reason erroneously, in supposing itself competent to reject surplus matter, stated in a statutory obligation, which contains every thing required by law, and incompetent to insert in such obligation, matter which it does not contain; or it may apply the principles improperly in the case. But the inconsistency of the two opinions is not perceived. If there be hostility between them, if there be any irreconcilable opposition, between the two positions, that a court may reject surplus matter in an instrument, but cannot aid the want of substance, that hostility, that opposiion, is not yet discovered."

9 C. J. 68, §113, says:

"Where the conditions of the bond are in the alternative, unless the election is given to the obligee, the performance of any one of the conditions releases the obligor who may elect which alternative shall be complied with, and a failure to perform one only does not result in a breach if the other may yet be performed."

9 C. J. 74, §127, says:

"An act of the obligee which prevents the obligor from performing one of two alternative conditions is a sufficient excuse for his nonperformance of the other."

It is clear from the statute that the bond must be in the alternative,—it must provide that the importer

will (a) export the goods within the required time, or (b) pay duties on the goods. The Treasury Department could not, if it would, dispense with either of these alternatives. But, to do the Department justice, it does not seem to have thought, except possibly in sporadic cases (of which this is one), that it could repeal or disregard the plain mandate of the statute. For from the customs regulations prescribing the form of the bond and from cases which have found their way into court it is evident that the Department has, in general, recognized that the bond *must be in the alternative.* Thus, in October, 1894, a bond was given by Lillian Russel under the tariff law enacted two months before (the first law, as we have seen, to mention expressly theatrical effects). The form of the condition thereof appears in the report of *United States v. Russell,* 84 Fed. 878, and was as follows:

> "Now, therefore, the condition of this obligation is such that if the said Lillian Russell shall well and truly observe and comply with the provisions of said paragraph 596, and export the said theatrical effects without the limits of the United States within six months from this date, *or,* in the event of her failure to export the said effects, pay the proper duties which the collector of customs of New York may assess upon the same, within the time prescribed by law for the collection of duties on imported merchandise, then this obligation to be void; otherwise to remain in full force and virtue."

And the Customs Regulations of 1908, issued by the Treasury Department, prescribe as follows:

> "Article 677. *Articles Embraced.* Theatrical scenery, properties and apparel brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them in such exhibitions and not for any other person nor for sale and which have been used by them abroad shall be admitted free of duty under bonds *conditioned for the payment of duties on such articles as shall not be exported within six months after importation.*"

And in Treasury Decision 29936, promulgated on August 6, 1909, the next day after the tariff law was enacted under which bond in suit was exacted from Grazi and the defendant, the following is found:

> "To collectors and other officers of the customs:
>
> "The existing regulations of this Department hereinafter referred to are hereby continued in full force and effect and are extended to importations under the tariff act of August 5, 1909, as follows: * * * Articles 677 and 678, Customs Regulations of 1908: To theatrical effects, under paragraph 656."

The so-called Catalogue Form No. 3775 prescribed by the Department appears to have been in use many years—was in use long before the bond in suit was given. It has been "amended" after the enactment of each new tariff law, not by any change in the body or conditions of the bond but by inserting the

appropriate new paragraph numbers, in lieu of the old paragraph numbers of the law, in the fine-print directions at the head of the bond. The form of this bond prescribed for use in connection with importation of theatrical effects and such other things as, under other provisions of law, are imported duty-free, subject to exportation, or, in the alternative, payment of duties, is given in Treasury Decision 31999, dated in November, 1911 (this form merely being the form long before used, amended as just stated), and is conditioned as follows:

> "Now, therefore, the condition of this obligation is such that if the aforesaid merchandise shall be actually exported within six months after the date of its importation and shall not, or any part thereof, be relanded in any port or place within the limits of the United States, and if the certificates and other proofs required by law and the customs regulations showing the delivery of the same at a foreign port or place shall be produced and deposited with the collector of customs at the said port of importation within one year from the date hereof, *or,* in default thereof, if the obligors shall pay the duties which may be assessed upon the said goods, wares, or merchandise, then this obligation shall be void; otherwise it shall remain in full force and effect."

It is apparent that the form is an old one for it is further directed in said Treasury Decision:

> "A supply of such forms will be furnished upon requisition therefor being made. The

> forms of Catalogues 3775 and 3779 *now on hand,* may, however, be used until the supply thereof is exhausted."

Thus there was no warrant either in law or the Customs Regulations, in the prescribed form or in the general practice of the Department, for any such bond as that in this case. As a statutory bond it is void.

There is internal evidence in the bond in suit that it was an antiquated and long-unused form when the collector took it. It appears (Tr. p. 3) to be form 158 instead of form No. 3775, and it is the latter which is spoken of in Treasury Decision 31999 of November, 1911, as having been in use for the purposes for which the complaint in this case represents this bond to have been taken. And the bond-form further recites (Tr. p. 3) that "This bond to be used for all purposes of importation of articles that are to be exported within six months, under Sections 2505, 2511, 2512 and 3021, Revised Statutes." Section 2505, as we have seen hereinbefore, is the old law of 1861 regarding "wearing apparel in actual use, and other personal effects, professional books, implements, instruments, and tools of trade, occupation or employment of persons arriving in the United States," and (not to mention the laws of 1883 and 1890) was superseded by the law of 1894 which is *very materially different* from section 2505 of the Revised Statutes. The form of the bond in suit may have been used for a few years after 1894 but there was no excuse at all for

its use at any time after the law of that year went into effect, for it and all subsequent acts clearly require a bond in the alternative.

The said regulations made by the Secretary of the Treasury have the force and effect of law.

United States v. Ormsbee, 74 Fed. 207, 209;
Gratiot v. United States, 4 How. 80, 117;
United States v. Eliason, 16 Pet. 291, 301-302.

And see:

Field v. Clark, 143 U. S. 649, 680, 693;
Tilley v. Savannah etc. R. Co., 5 Fed. 641, 655-659;
Chicago & N. W. R. Co. v. Dey, 35 Fed. 866, 874-875.

This court takes judicial notice of the rules and regulations promulgated by the Secretary of the Treasury under the authority of and supplementary to the provisions of section 656 of the act of August 5, 1909.

Caha v. United States, 152 U. S. 211, 221-222;
Cosmos etc. Co. v. Gray Eagle Oil Co., 190 U. S. 301, 309.

Where the bond is set out in the complaint, or oyer thereof is craved and had, the proper way to raise the question of its invalidity for failure to conform to the statutory requirements, is by demurrer.

United States v. Hodson, 10 Wall. 395, 404.

The question was so raised in:

Dixon v. United States, 1 Brock. 177, Fed. Cas. No. 3,934;
Sullivan v. Alexander, 19 Johns. (N. Y.) 233;
People v. Meighan, 1 Hill (N. Y.) 298.

If the bond is void it is competent for the defendant to raise the objection at any stage of the trial.

United States v. Hodson, 10 Wall. 395, 404.

The lower court (Tr. p. 28) cited and quoted from *United States v. Dieckerhoff,* 202 U. S. 302, 309, as sustaining the proposition that even if a bond is "not strictly in conformity with the statute, if it does not run counter with the statute, and is neither *malum prohibitum* nor *malum in se,* it is a valid bond." That principle is undoubtedly true if it is correctly limited and applied. It was so limited and applied in the *Dieckerhoff* case. In that case there was no question about the *condition* of the bond; the only question was as to the *amount of the penalty* in case the condition was broken. The court held that since the statute permitted the penalty to be twice the value of the whole importation, a bond which named as the amount of the penalty twice the value of only a part of the importation (namely, of the particular package not returned to the collector upon demand) the defendant was in no position to say that the bond was not valid; because the penalty was less, not more, than might have been named in the bond. Said the court, p. 310:

> "Certainly the makers of the bond cannot complain that they have been permitted, by its terms, to discharge the obligation to return a *package* by paying *its value,* when a bond in *double the value of the merchandise* * * * might have been required."

Naturally, a bond naming a penalty not as great as the statute would have permitted to be exacted "does not run counter with the statute." It might even be that a bond naming a greater penalty than the statute authorized would be valid for the amount authorized by the statute. See *State v. Taylor,* 10 S. D. 188, 72 N. W. 409, 66 Am. St. Rep. 711; *Smith v. United States,* 5 Ariz. 64, 45 Pac. 344. But quite different considerations control this case. Here the obligor is bound by the bond to do one certain thing or forfeit the bond, while the statute permits him to do, at his pleasure, either said certain thing or another thing specified. Such a bond clearly does "run counter with the statute." This case differs from the *Dieckerhoff* case, therefore, in these all-important respects: the bond here imposes a *more* onerous *condition,* the bond there imposed a *less* onerous *penalty,* than is mentioned in the statute. Therefore, the bond here is void, while that there was valid.

The Bond in Suit is Void Because of the Restriction Therein Against Exportation Through Any Port but San Francisco.

This bond is conditioned on the exportation of the goods through the port of San Francisco, where the bond was taken (Tr. pp. 3-4). The statute

contains no such restriction. From the forms and precedents which we have hereinbefore considered it is apparent that no such restriction was prescribed or practiced by the Department. If Grazi had ended his season at Savannah, Georgia, or at New Orleans, he must still have shipped the goods back to San Francisco for export, in order to comply with this bond. Such a restriction renders the bond void.

In *Dixon v. United States,* 1 Brock. 177, Fed. Cas. No. 3,934, Chief Justice Marshall said:

> "But may the statute be exceeded? It would certainly be mischievous, to allow officers to insert in the bonds they are empowered to require, conditions not warranted by law. Although courts and lawyers may know that such conditions have no effect, obligors may not know it, and this abuse of official power may very materially affect the interest of individuals, who may regulate their conduct on the opinion, that they are bound to the full extent of the instrument they have executed. That, in this particular case, the condition inserted may not be in hostility to the general views of the legislature, cannot materially vary the question, for it is not warranted by the statute; and if the officer be at liberty, under the colour of office, to introduce such conditions as his own judgment may approve, then his judgment, and not the statute, becomes the director of his conduct."

People v. Meighan, 1 Hill (N. Y.) 298, was on a bastardy bond in which the officer taking it had

inserted a condition not mentioned in the statute, in addition to the statutory condition. The court held the bond wholly void and said, by Cowen, J., p. 299:

> "This was a material addition, which might prove much more onerous than the condition required by the section. The latter is generally to indemnify, &c. which may be by providing for the child, under some mutual arrangement, or in some other way. The former leaves but one mode; the payment of the money to be ordered."

It is true that a statute of New York is mentioned which seems to have rendered void any bond not in the form required by the statute. But we submit that the same result must have been reached even in the absence of such a statute.

In *Sullivan v. Alexander,* 19 Johns. (N. Y.) 233, there was an addition, not authorized by the statute, to the condition of the bond. The bond was taken by a sheriff on suffering a prisoner in execution to go at large within the limits of the liberties of the jail. The addition not authorized by statute was the words "that the prisoner should, at the request of the sheriff, again surrender himself to the prison." The bond was held void. Spencer, C. J., said *p. 235:

> "This is a substantial and material part of the condition. * * * *Beawfage's* case (10 Co. 100), *Kidwelly v. Brand* (Plowd. 60, 68), and *Rogers v. Reeves* (1 Term Rep. 418), are some of the many cases which show that such a bond is void. A mere verbal difference or departure from the provisions of the statute,

will not render a bond to the sheriff void; but when there is a substantial variance, as if the sheriff adds to the condition that he shall be kept without damage against the king and the plaintiff, that will make the whole condition void. The sheriff, in this case, had no right to require the defendant, Alexander, to surrender himself to prison, at his request. He has a right to reimprison a defendant who has been admitted to the liberties of the gaol, in one case only; that is, when the sureties taken for the prisoner are insufficient; but the condition to this bond does not embrace that case. We are of opinion, therefore, that the defendants are entitled to judgment."

We take the following from the opinion of Mr. Justice Washington in *United States v. Morgan et al.,* 3 Wash. C. C. 10:

"The embargo law, under which this obligation was taken, does not set out, in precise terms, the form of it; but the material parts of it are clearly prescribed. It is to be in a sum of double the value of vessel and cargo, with condition that the goods shall be relanded in some port of the United States, dangers of the sea excepted. If it be taken in a greater sum than the law directs;—if the condition stipulate a relanding elsewhere than in the United States;—if it stipulate a relanding absolutely, when the law requires it to be done on a certain condition;—or if it bind the obligors to do more than the law requires—it is not the bond which the officer was authorized to take, and all is void. A contrary doctrine might be productive of the most intolerable oppression to the citizen,

as well as of detriment to the government. * * *

"Applying the above principles to this case, the bond is void;—first, because the condition is to reland the cargo within the United States, although the obligors might have been prevented from doing so, by a peril of the sea; and secondly, because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time, whereas the law did not impose upon the obligors the necessity of returning the certificate to that officer at all, much less to do so within any prescribed period."

Hence, in the bond in the case at bar there are two restrictions upon the obligors, neither of them at all warranted by law, and either of which alone would (independently of the other) render the bond void. The one restriction is that the obligors *must* export, whereas the statute permits them to export *or* pay the duty, at their pleasure. The other restriction is that they must export from the port of San Francisco, whereas the law permits them to export from any port of export of the United States. Speaking of the case of *United States v. Morgan,* Fed. Cas. No. 15,809, Judge Hopkinson, in *United States v. Brown,* Gilp. 155, Fed. Cas. No. 14,663, has the following to say, which is a very good statement of the defects in the bond in suit:

"It is impossible to make the bond in Morgan's Case conform to the law, by taking away any part of it. You must make altogether a new and a different condition; you must add an important qualification or exception given by

> an act of congress, and not given by the bond; and you must essentially change, indeed expunge another part of the condition, which was not warranted by the law. In short, you must make a new contract between the parties."

So here you must make "a new and a different condition"—that the obligor shall pay the duties on the goods; and "you must essentially change, indeed expunge, another part of the condition, which was not warranted by the law"—the condition that the goods be redelivered to the collector of the port at San Francisco for export.

The Bond in Suit is Void as a Common Law Obligation Because as Such it Has No Basis on Which to Rest and is Without Consideration.

Paragraph 656 of the tariff act of 1909 permits free importation of theatrical effects on one condition only, so far as the *form of the bond* is concerned; namely, that the importer shall give a bond in the alternative (to export within a prescribed period *or* to pay the duty). If he does not give that particular character and form of bond the goods are clearly *not* duty-free under that paragraph. That is, if a bond of that character is not given the obligation exists against the importer to pay the duties on the goods.

Therefore, had this bond been conditioned *to pay the duties* on the goods there would have been room for argument that, entirely apart from paragraph 656, it would be a good common law bond because

conditioned for the performance of an obligation or duty resting on the importer—an obligation arising under other provisions of law than said paragraph 656. But the bond in suit is not so conditioned. It is conditioned to export through the port of San Francisco. There was no obligation imposed by any law whatsoever, and no natural obligation arising independently of law, to export said goods through the port of San Francisco, or through any other port, or at all. Therefore, there was no basis for the bond in suit to rest on.

The government, in default of Grazi's giving a bond in the form prescribed by the statute, might have said to him, "Since the bond in the statutory form has not been given by you, the duties are payable and we will not deliver the goods to you unless you either pay the duties in cash or give a bond conditioned for their payment." If he had thereupon given the latter bond, it could, with reason, be argued that such a bond is a good common law bond. But that is not what the government said or did; it is not that kind of bond which it took. It took a bond conditioned for the doing of something which Grazi was under no legal or moral or natural obligation at all to do.

Import duties are taxes. Taxes are not contractual, but the payment thereof is a non-contractual obligation. However, a promise, on due consideration, in form of bond or in other form, to pay taxes *is* contractual. The delivery of imported goods by the government to the importer may be a

consideration for the promise to pay the import tax, to pay which is, as just stated, a non-contractual obligation. But the delivery of imported goods by the government to the importer cannot be a consideration for a promise, in form of bond or otherwise, to export them out of the country, for there is no obligation of any kind or nature to export them. In fact, abstractly, and purely as a matter of policy, the civilized governments of the world, including our own, encourage importation of all goods which possess no noxious feature. Hence, viewed as a common law bond, the bond in suit was wholly without any legal or valid consideration.

As a common law bond it is void.

We respectfully submit that the amended demurrer to the complaint should have been sustained, and that judgment should have been given for the defendant, and that the judgment of the Court below should be reversed.

Respectfully submitted,

F. deJOURNEL,
T. C. WEST,
ROY V. NYE,
Attorneys for Plaintiff in Error.